IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 26TH MARCH 2007 / 5TH CHAITHRA 1929

CRL.A.No. 990 of 2002()

SC.454/1999 of ADDL. DISTRICT AND SESSIONS JUDGE FAST TRACK (ADHOC-II), KOZHIKODE

.....

APPELLANT: ACCUSED:

VASU, S/O. KANNAN, AGED 48 YEARS,
RESIDING AT POYIKAYIL, KUNNUMMEL
AMSOM DESOM, VADAKARA.

BY ADV. SRI.P.S.SREEDHARAN PILLAI
SRI.P.GOPINATH

RESPONDENTS: STATE:

STATE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. P.P.RAVINDRA BABU

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26.03.2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO. 990 OF 2002

Dated this the 26th day of March, 2007.

JUDGMENT

The appellant faced trial for an offence punishable under Section 55 (a) of the Abkari Act on the allegation that he was found in possession of MO1 can containing 9 liters of arrack and MO2 glass on 28.8.1998 at about 4.20 p.m without having any licence or permit under the provisions of the Abkari Act and thereby committed the above offence. To prove the case against the appellant, nine witnesses were examined by the prosecution and Exts. P1 to P9 were produced. MOs 1 and 2 were also produced before the court. After closing of the prosecution evidence, the appellant was questioned under Section 313 of the Code of Criminal Procedure. Denying the prosecution allegation, the appellant had stated that he is innocent in the case and the case was foisted against him due to political enmity entertained by Pws 4 and 5 as he stood as a witness for the recovery of certain material objects in connection with a political case. To prove this contention, the appellant also relied on Exts.D1 recovery mahazar prepared in connection with Crime No.239/1998 of Kuttiady Police Station. However, accepting the evidence adduced by the prosecution, the trial court found the

appellant guilty under Section 55 (a) of the Abkari Act and he was convicted thereunder and sentenced to undergo R.I for two and a half years and to pay a fine of Rupees One lakh with default sentence of fine, a further S.I for a period of six months. The above judgment of the trial court is challenged in this appeal.

2. This Court heard the learned counsel appearing for the appellant as well as the Public Prosecutor. The learned counsel appearing for the appellant had taken the following contentions before this Court for challenging the judgment of the trial court. Firstly, it is contended that the trial court had committed a serious error in finding the appellant guilty of the charge relying on the evidence of Pws 1, 2 and 8, who are the police officials, as all the independent witnesses including the informant of the offence turned hostile to the prosecution. Secondly, it is contended that while PW8 detecting the offence, he had not complied with the provisions of the Abkari Act as well as the provisions of the Kerala Excise Manuel for preparation of the seizure mahazar, seizure of the contraband article, taking of the sample, sealing and labeling of the same. Thirdly, it is contended that the trial court had committed a serious error in convicting the appellant for the offence charged against him as the

prosecution had failed to adduce proper and legal evidence to show that the contraband seized and the sample taken were produced before the court in time and also kept the contraband in proper custody till the same produced before the court as either PW8 or PW9 had given any evidence regarding proper custody of the contraband before the same produced before the court.

3. The prosecution case as spoken to by PW8, PW1 and PW2 is that on 28.8.1998 when these officers were on patrol duty through the Kuttiadi road, it was informed by Pws 4 and 5 by introducing themselves to the Sub Inspector as the members of Liquor Prohibition Committee of the locality that the appellant was selling illicit arrack at a place called Moonnuthegullathil Parambu which is near the house of Anavayal Kallullaparambath Chathu and on getting that information, Pws 1, 2 ,8 and Pws 4 and 5 went near the place and when they reached at a distance of 10 to 15 meters away from the place, they have seen three persons were standing in the above said paramba and the appellant was having a black can having 10 liters capacity and a glass and the other two persons were standing near him. When the police party and the other witnesses, Pws 4 and 5 reached at the spot, the appellant tried to escape from

the scene. However, on questioning him it was revealed that the appellant was having in his possession MO1 can, which contained about 9 liters of illicit arrack and also MO2 glass. The further case of the prosecution is that on preparing Ext.P5 mahazar, MOs 1 and 2 were seized and in the presence of two other independent witnesses namely Pws 3 and 6, the contraband was seized from the appellant and sample was also taken and both the contraband and the sample were taken to the police station and registered a crime against the appellant and thereafter on the next day, the sample and the contraband were produced before the court along with the appellant. As per Ext.P9 chemical report, it was revealed that the sample contained 30.01% ethyl alcohol by volume and finally charge was filed against the appellant To prove the prosecution case, the trial court relied on the evidence of Pws 1, 2,8 and 9, out of whom PW8 is the Sub Inspector of Police, Kuttiadi, who detected the offence and, according to him, on 28.8.1998 himself and other police officers including Pws 1, 2 and 3 were on patrol duty and when they reached at the junction, both Pws 4 and 5 introduced themselves as the members of the Anti Liquor Committee of the locality and informed them that the appellant was selling arrack in the Moonnuthengullathil Parambu and receiving that information, the Sub Inspector and the

police party and Pws 4 and 5 reached at the spot. This witness has further stated that when they reached at the spot though the appellant tried to escape from the scene, he was stopped by them and was questioned and it was revealed that the appellant was in possession of MO1 can which contained 9 liters of arrack and thereafter on preparing Ext.P5 mahazar the contraband was seized and two bottles of samples were also taken from the contraband measuring about 250 ml each. This witness has further stated that the appellant was arrested at the spot on preparing Ext.P3 arrest memo and that subsequently he was produced before the court. The evidence of this witness was supported by the evidence of Pws 1 and 2, who also accompanied PW8 in the patrol duty and at the time of the detection of the offence. This witness has also stated that he had got information regarding commission of the offence by the appellant from Pws 4 and 5. The evidence of these witnesses has been accepted by the trial court. The sample taken by PW8 has been got analysed and as per Ext.P9, it was reported that the sample contained 30.01% ethyl alcohol by volume and final charge has been filed. The trial court though found that Pws 3 to 6 were not supporting the prosecution case, the court accepted their presence at the spot since their signatures were seen in Ext.P3 arrest

memo as well as in the inspection memo prepared by PW8.

4. The question to be decided in this appeal in the light of the contentions raised by the counsel appearing for the appellant is that whether the judgment of the trial court is sustainable or not. The prosecution case itself is originated on the basis of the information alleged to have been given by Pws 4 and 5, who claimed themselves as the members of the Anti Liquor Committee of the locality, that the appellant was selling arrack at the place and time. But the very fact that these two witnesses turned hostile to the prosecution and they have stated that they were not the members of the so called Anti Liquor Committee of the locality and they have not seen any contraband seized from the appellant as alleged by the prosecution creates doubt on the truth of the prosecution case. Apart from the evidence of these witnesses, they have not seen anything seized from the appellant and PW3 - the alleged independent witness, who had cited to prove the seizure of MOs 1 and 2 from the appellant and had not seen signed in Ext.P5 mahazar and had not supported the prosecution case. Whereas, PW8 has categorically stated that independent witnesses were present at the scene when the contraband was seized from the appellant. Hence, from the

evidence of Pws 4 and 5 it could be seen that Ext.P5 mahazar prepared by PW8 is not a guarantee to show that MOs 1 and 2 were seized from the appellant as alleged by the prosecution. To further substantiate this contention, the argument of the learned counsel appearing for the appellant is that as per Ext.P7 property list and Ext.P8 request and forwarding letter it is not clear when the contraband article seized and the samples alleged to have been taken have produced the court. In this context, it could be seen that as per Ext.P7 list, it is recorded that the samples and the contraband were reached the court only on 10.9.1998. Admittedly, there is delay of more than 11 days. In this context, the evidence of Pws 8 and 9 are very relevant with regard to keeping of the contraband and the samples in safe custody till the same were produced before the court. PW8 had no knowledge about keeping of the contraband till the same produced before the court. According to him, on seizing the article on 28.8.1998 the same was entrusted with the writer of the police station and the writer was not examined before the court and that apart, the clear evidence of PW9 would show that he was not aware where the contraband was kept till the same were produced before the court. Hence, coupled with the delay in producing the contraband before the court and non-explanation of the delay by the

prosecution and also lack of evidence adduced by the prosecution that the contraband was kept in proper custody applying the principles laid down by this Court in the judgment reported in **Narayanan v. Excise Inspector** (2003 KLT 725), wherein it is the duty of the prosecution to give evidence of the proper custody of the contraband till the same produced before the court to rule out the possibility of tampering with the contraband article and the sample causes certain doubt regarding truth of the prosecution case.

5. Considering the entire evidence adduced before the court, this Court is not in a position to hold that the prosecution had proved its case against the appellant beyond reasonable doubt. Hence, benefit of doubt has to be given to the appellant. The next point to be considered in the light of the argument of the learned counsel is that when PW8 detected the crime, he should have taken all precautionary measures to show that seizure was made in accordance with the provisions of the Abkari Act as well as the Kerala Excise Manual. It is incumbent on the part of PW8 that the sample as well as the contraband be labeled and sealed and get the signatures of the independent witnesses as well as the accused. With regard to this aspect, a specific question was put to PW8 in the cross

examination for which the answer given by him would show that he was not sure whether any label was put on the contraband and the samples as per the provisions of the Abkari Act as well as the Kerala Excise Manuel. Hence, this fact is also to be construed against the prosecution and the benefit regarding this also shall be given to the appellant. Lastly, the learned trial judge had considered the evidence of Pws 1, 2 and 8 as the best evidence to find the appellant guilty under Section 55(a) of the Abkari Act. This Court had already gone through the charge framed by the court below against the appellant. As per the court charge it is stated that the appellant was found in possession of the contraband in violation of the provisions of the Abkari Act and the Rules framed thereunder. As per the latest judgment of this Court reported in **Sudephan @ Aniyan v. State of Kerala** (2005 (2) KLD (Crl.) 631) it is the duty of the prosecution to allege and prove that the contraband was found in possession of the accused in connection with transport, export or transist of any liquor and it is the duty of the prosecution to prove that the appellant was found in possession of the contraband for the purpose of sale. There was no charge against the appellant for that effect except the allegation that MO2 glass was seized from him. There no other evidence is adduced by the prosecution on this aspect. No

investigation has also been done by PW8 or other police officials in this line.

In the above circumstances, the prosecution case against the appellant would fall. In the light of the discussions made and the reasons adopted, this Court is of the view that the judgment of the trial court has to be set aside. Accordingly, the judgment under appeal is set aside. The appellant is not found guilty of the offence and he is acquitted of the charge and his bail bonds shall stand canceled.

K. THANKAPPAN, JUDGE.

cl

K. THANKAPPAN, J.

CRL.A.NO.990 OF 2002-C

JUDGMENT

26th March, 2007.